

So, no, this is not *AT&T/TCI redux*. AT&T has demonstrated no significant public interest benefits from this merger that could not be achieved through other business arrangements. The harms posed in the video and data markets, on the other hand, are substantial and merger-specific.¹⁵ Still, viewing this merger only in its piece parts provides only a limited vista—and fails to capture the full breadth of this transaction's significance.

The Bigger Picture: Thwarting Video Competition And Leveraging The Future Of Broadband Communications

While the Commission will be well-served by several of the full market-by-market analyses of the merger submitted in the docket, AOL urges the agency to assess the impact of this consolidation not just by its component parts—but also by stepping back to appreciate its aggregate effects. Even in establishing its *Bell Atlantic/NYNEX* market-by-market test, the FCC still requires applicants to “demonstrat[e] . . . that the proposed transaction is in the public interest”¹⁶ and “to prove that, on balance, the merger will enhance and promote, rather than eliminate or retard, competition.”¹⁷ What, then, “on balance,” are the cumulative effects this merger would produce for competition and consumers?

¹⁵ Indeed, as consumer groups have documented, AT&T ignored such FCC formalities as affidavits, documentation of facts, showings of rule compliance and requests for necessary waivers. The parties have failed even to bother with making the showings that the cable horizontal cap and wireless ownership rules require for the extraordinary ownership interests this merger would bring together. See, e.g., *Motion to Dismiss of the Media Access Project*, in CS Docket 99-251 (August 17, 1999).

¹⁶ *Application of NYNEX Corporation, Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, 12 FCC Rcd 19985, 20001 (Aug. 14, 1997) (“*Bell Atlantic/NYNEX Order*”) (“[A]pplicants bear the burden of demonstrating that the transaction is in the public interest”); *AT&T/TCI Order* at ¶ 15 (“The Applicants bear the burden of proving that the transaction serves the public interest.”).

¹⁷ *Bell Atlantic/NYNEX Order* at 19988.

We submit that, to answer this question, the Commission should examine certain critical “mega-effects” of the proposed AT&T/MediaOne combination. First, the FCC should consider how this merger’s video and Internet access components together would serve to keep consumers from obtaining access to Internet-delivered video programming—and thereby shield cable from competition in the video marketplace. Second, the agency should reflect upon how this merger would enable cable to use its RBOC-like structure to limit consumer access to the increasingly integrated video/voice/data communications services offered over the broadband pipe controlled by cable. And finally, the agency should recognize how these two “mega-effects” of the merger together reinforce cable’s ability to deny consumers the right to choose: (a) between a competitive video-enhanced Internet service rather than a traditional cable service; (b) among competing cable Internet services; and (c) among competing “bundles” of video/data/voice services that contain multichannel video.

As to the first issue, this merger would significantly enhance AT&T’s ability to restrict, or even cut off, consumers from gaining access to Internet-based competition to cable’s core market—multichannel video delivery. First, it would dramatically expand the scope of AT&T’s control over the cable broadband pipe nationwide, affording AT&T a stake in facilities passing virtually two out of every three U.S. homes reached by cable.¹⁸ This control of broadband transport facilities would be exacerbated by AT&T’s joint ownership of

¹⁸ AT&T, through its recent acquisition of TCI, already holds attributable interests in systems passing over 35 million homes—well exceeding the current cap for cable horizontal ownership. *See Description of the Transaction*. The proposed merger between AT&T and MediaOne would dramatically add to these holdings: if approved, AT&T would gain the ability to control or otherwise influence cable systems serving approximately 23.784 million additional homes, for an apparent total of nearly 59 million homes passed or 62% of the homes passed nationwide. *See id.* at App. B.

@Home and Road Runner, the two major cable ISPs that together serve a reported 98% of all cable Internet subscribers—though of course each maintains exclusive rights within its respective territories.¹⁹

This combination would remove the possibility that any @Home/RoadRunner “competition” would spur at least one of the cable ISPs to lift the 10-minute cap that *both* currently impose on non-affiliated providers of “streaming video.”²⁰ As AT&T has admitted, by maintaining its broadband facilities as a closed network, AT&T can enforce this anticompetitive “restriction which we imposed on @Home so that we were the determiner of how stream[ing] video worked in our world.”²¹ Thus, this merger would serve to defend cable’s core video market position by blocking consumers’ access to video programming delivered via the Internet.

The second “mega-effect” of this proposed merger is of even broader potential consequence. With this merger, AT&T would take an enormous next step toward its ability to deny consumers a choice among competing providers of integrated voice/video/data

¹⁹ See generally *The Battle for the Last Mile*, *The Economist*, May 1, 1999 at 59.

²⁰ See, e.g., *Prospectus/Proxy Statement of @Home Network*, at 144 (Apr. 27, 1999) (“[A] principal cable partner has the right to block access to content that [. . .] includes streaming video segments of more than ten minutes in duration . . .”); *PC-TV Convergence Driving Streaming Industry Growth*, Warren’s Cable Regulation Monitor, Vol. 7, Issue 9 (Mar. 1, 1999) (“One irony of streaming video over Internet is that while cable broadband networks provide fat pipe necessary for quality streaming, major cable online providers @Home and Road Runner both limit consumers to 10-min. streaming segments”).

²¹ Testimony of Leo Hindery, President, TCI, Inc., *Telecom Mergers: En Banc Hearing on Telecom Mergers To Discuss Recent Consolidation Activities in the Telecommunications Industry, Focusing on Three of the Proposed Mergers Before the Federal Communications Commission* (Oct. 22, 1998).

offerings—a communications marketplace that integrates, and transcends, an array of communications services and markets previously viewed as distinct.

“Whether we’re talking about the transmission of video, voice or data,” AT&T has plainly stated, “we’re moving towards a single information opportunity that people would turn to for the variety of services that have always been offered separately.”²² Combining “[m]essaging, movies, e-mail and e-commerce” with the ability to “[d]ownload[] from the Internet at speeds up to a hundred times faster than modems commonly in use today,” this “confluence of the digital age . . . and the Internet era” looks to “eras[e] the boundaries between applications and devices.”²³ And AT&T looks to become the nationwide electronic gateway through which consumers would come to access this increasingly integrated video/voice/data service.

As stated at the time of the TCI merger, the AT&T/TCI plan is for consumers to “have to go through us.”²⁴ Building on its control over critical last mile broadband facilities, AT&T would deny cable consumers the ability to choose among competing electronic program guides (“EPGs”) or browsers for these new integrated services. And through combined interests in both @Home and Road Runner, AT&T would derive added leverage over the content,

²² See Remarks by C. Michael Armstrong, *Cable Ready: Convergence and the Communications Revolution*, 1999 National Cable Television Association Convention, June 14, 1999 <http://www.att.com/speeches/99/990614_cma.html> (visited Aug. 20, 1999) (as delivered).

²³ *Id.*

²⁴ Ken Auletta, *How the AT&T Deal Will Help John Malone Get Into Your House*, *The New Yorker*, July 13, 1998, at 25.

commerce, and new applications that broadband should make possible—thereby shaping the terms under which consumers may utilize to advanced communication services.

At every key link in the broadband distribution chain for video/voice/data services, AT&T would possess the ability and incentive to limit consumer choice. Whether through its exclusive control of the EPG or browser that serve as consumers' interface;²⁵ its integration of favored Microsoft operating systems in set-top boxes;²⁶ its control of the cable broadband pipe itself;²⁷ its exclusive dealing with its own proprietary cable ISPs;²⁸ or the required use of its own "backbone" long distance facilities;²⁹ AT&T could block or choke off consumers' ability to choose among the access, Internet services, and integrated services of their choice. Eliminating consumer choice will diminish innovation, increase prices, and chill consumer demand, thereby slowing the roll-out of integrated service.

²⁵ See, e.g., *Comments of the National Cable Television Association*, CS Docket No. 97-80 (May 16, 1997).

²⁶ See, e.g., Jim Davis, *Microsoft deal prompts hardware questions*, CNET News.com, May 10, 1999 <<http://www.news.com/News/Item/0,4,36287,00.html>> (noting that the "\$5 billion investment by Microsoft in AT&T [ensures] that at least 7.5 million cable set-tops would use Microsoft's Windows CE software").

²⁷ As noted, AT&T/MediaOne would control the cable broadband transport into the homes of almost two-thirds of all potential customers. See n.17, *supra*.

²⁸ AT&T and MediaOne each hold a large interest in one of two major cable broadband Internet service providers, @Home and Road Runner, respectively. Each of these ISPs demand to be a given MSO's exclusive cable ISP. See, e.g., *At Home Corp. SEC Form 424B4*, filed May 20, 1999, at 5-8; *Road Runner website* at www.rr.com/rdrun/company/main_profile.html. See generally n.13, *supra*, and accompanying text.

²⁹ See, e.g., @Home Press Release, *@Home Network to Create Internet Backbone with Initial Capacity for 5 Million Broadband Users*, Jan. 6, 1999 <http://www.home.net/news/pr_990105_01.html> ("@Home Network . . . today announced a long-term agreement with

Is This What Broadband Was Meant To Be?

By strengthening cable's grip on the video marketplace, this merger would undermine Congress and the Commission's efforts to spur greater video competition and solve the long-standing "cable problem."³⁰ And the familiar shadow of higher prices, lower quality, and lost choice would fall as well over an Internet market that has thrived on intense competition in price, performance, service, innovation, and content—and thereby generated tremendous investment to continue the growth cycle. Across video, data, and new integrated video/voice/data markets, this deal would reduce actual competition, forfeit potential competition, sacrifice consumer choice, undermine broadband investment, stifle innovation, limit diversity, and deny consumers better services at lower prices.

This is not what the deployment of broadband, nor the advent of "one-stop shopping" for communications services, was supposed to mean for consumers.

An Open Access Safeguard Offers A Critical Competitive Check

It is not too late for the Commission to tackle the key obstacle to its competitive vision for broadband deployment and one-stop shopping across an expanding array of communications services. Not yet. Given AT&T's determined pursuit of end-to-end control of the key broadband pipe for delivery of voice, video, and data and the further entrenchment of its ability to deny consumers an Internet alternative to traditional video services, it is

(...Continued)

AT&T to create a nationwide Internet Protocol (IP) network utilizing AT&T's Dense Wave Division Multiplexing (DWDM) backbone").

³⁰ See, e.g., *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 24284, 24287 (1998) ("We find that cable television continues to be the primary delivery technology for the distribution of multichannel video programming and continues to occupy a dominant position in the MVPD marketplace").

inevitable that policymakers will at some point be compelled to address AT&T's broadband gatekeeper role. The real question is when—and how.

The Commission surely could choose to continue to “vigilantly monitor” the situation for some years. Then, long after cable has begun building its “electronic national gateway,” perhaps a wrenching, court-ordered restructuring of the communications industry might be the answer. The alternative might be a massive re-regulation that swamps Congress, the FCC, the industry, and even consumers in its wake. In the interim, consumer choice would be diminished and broadband would fail to fulfill its potential. Instead, the Commission could take action now to lay out a pro-competitive access policy that responds to “[c]onsumers—the people who actually drive a market—who deserve and will demand an open platform.”³¹

The key, after all, is the ability to use “first mile” pipeline control to deny consumers direct access to, and thus a real choice among, the content and services offered by independent providers. Open access would provide a targeted and narrow fix to this problem. AT&T simply would not be allowed to control consumers' ability to choose service providers other than those AT&T itself has chosen for them. This would create an environment where independent, competitive service providers will have access to the broadband “first mile” controlled by AT&T—the pipe into consumers' homes—in order to provide a full, expanding range of voice, video, and data services requested by consumers. The ability to stifle Internet-based video competition and to restrict access to providers of broadband content, commerce and other new applications thus would be directly diminished.

³¹ Chairman FCBA Remarks.

Moreover, an open access requirement would provide choice and competition of another kind as well. It would allow ISPs to choose between the first-mile facilities of telephone and cable operators based on their relative price, performance, and features. This would spur the loop-to-loop, facilities-based competition contemplated by the Telecommunications Act of 1996, thereby offering consumers more widespread availability of Internet access; increasing affordability due to the downward pressures on prices; and a menu of service options varying in price, speed, reliability, content, and customer service.

The essence of an open access policy is thus competition, not regulation. Open access would create a competitive check on conduct—a far more preferable option than a behavioral check requiring constant step-by-step scrutiny of a cable operator's dealings with every provider of content or new applications to make sure that the company's conduct doesn't skew its network in favor of affiliated service providers.

This approach does not require imposition of legacy common carrier regulation. The model for such early, targeted safeguarding is drawn directly from the existing cable regulatory framework, but its policy foundation cuts across all FCC regulation. Any cable television system operator that provides any Internet service provider access to its broadband cable facilities would have to provide a requesting ISP comparable access to its facilities on rates, terms, and conditions equal to those under which it provides access to its affiliate or to any other person.

Commission policy already reflects the fundamental concern that cable operators' ability and incentive to exercise bottleneck control over their distribution facilities may impede both consumer choice and the development of competitive markets. Cable broadband deserves no less a competitive check.

Bringing Cable Internet Access In Step With FCC Competition Policy

Adoption of an open access policy would be fully in step with the FCC's competition policy. The "open platforms" principle our proposal advances reflects the approach outlined, with great prescience, by Vice President Gore in January 1994. The Vice President articulated a "National Information Infrastructure" policy predicated upon open network access for all information providers.³² Indeed, the Administration later specifically announced the U.S. policy goal of "ensuring that online service providers can reach end-users on reasonable and nondiscriminatory terms and conditions."³³

The Commission has also firmly embraced an "open platforms" policy as central to its overarching competition agenda—at least for *one* of the two incumbent local facilities-based providers of advanced services. Yet according to the FCC's recent amicus brief on the subject, "[f]unctionally, Internet access provided through cable modems is no different from the broadband capability provided over other facilities such as the wireline telephone network. . . ."³⁴ As this brief further explained: "If the same type of Internet access service is offered over cable systems as well as telephone networks, it is not readily apparent why the classification of the service should vary with the facilities used to provide the service."³⁵

³² See generally, *Vice President Al Gore's Speech before the ITV*, National Information Infrastructure, Buenos Aires (March 21, 1994).

³³ The White House, *A Framework for Global Electronic Commerce*, July 1, 1997, at 11 ("Global Electronic Commerce").

³⁴ *Amicus Curiae* Brief of the Federal Communications Commission, *AT&T, et al. v. City of Portland*, CV No. 99-35609, at 25 (9th Cir. filed Aug. 16, 1999).

³⁵ *Id.*

These FCC observations reflect the essence of the Commission's oft-repeated view that it must break free of outdated regulatory pigeonholes if it is to adapt its rules to a world of converging technologies, services and industries. Quite to the contrary, however, review of Commission pronouncements on the issue of cable Internet access—juxtaposed against the policy pillars of the Commission's otherwise prevailing agenda for competition in advanced services—reveal FCC policies squarely at war with themselves:

- **On Consumer Choice:** The FCC has long emphasized: that “consumers must ultimately have the right to choose providers” as a “fundamental right;”³⁶ the importance of “broadband pipes [being] used to expand, not restrict, consumer choice;”³⁷ and how the consumer benefits from one-stop shopping arise “only when all providers have a fair and realistic opportunity to offer each service” that goes into the bundle.³⁸

Why then, “if a cable company were to monopolize the access market,” is the “loss of consumer choice... probably overstated?”³⁹ And why is it not the provider of choice but rather “the ability to access the Internet content. . . of his or her choice” that matters?⁴⁰

- **On Openness:** The FCC has recognized that a key “characteristic of the Internet that [has] contributed to its growth [is] its . . . openness”⁴¹ and that broadband consumers will also “want and expect choice [and] openness.”⁴²

³⁶ *Hearings Before the Senate Judiciary Subcomm. on Antitrust, Business Rights and Competition* (separate statement of William Kennard) (Mar. 4, 1998).

³⁷ *See Report to Congress on the Deployment of Advanced Services* (separate statement of William Kennard) (Jan. 28, 1999).

³⁸ *Hearings Before the Senate Judiciary Subcomm. on Antitrust, Business Rights and Competition, supra.*

³⁹ Remarks by FCC Commissioner Michael Powell Before the Federal Communications Bar Association, Chicago Chapter, Chicago, IL (June 15, 1999).

⁴⁰ *Testimony Before the Senate Judiciary Subcommittee on Antitrust, Business Rights* (March 4, 1998).

⁴¹ *See Report to Congress on the Deployment of Advanced Services* (separate statement of Susan Ness) (Jan. 28, 1999).

⁴² Chairman FCBA Remarks.

Why then, as to cable Internet access, is "it not clear that the perceived benefits of mandating open access outweigh their apparent economic and technological costs"⁴³ and that open access would not "chill investment in cable modem service"?⁴⁴

- **On Merger Review:** The Commission has found the SBC/Ameritech proceeding and other ILEC mergers to be appropriate vehicles for establishing advanced services deployment policy.⁴⁵

Why then, "while these [cable Internet access] concerns are important," are they deemed "not unique or specific to [the AT&T/TCI] merger?"⁴⁶

- **On "Unregulation" of the Internet:** The Commission has held to the fundamental distinction that "[w]e seek not to regulate the Internet, but rather to ensure that Internet services which rely on telecommunications transmission capacity, remain competitive, accessible, and devoid of entry barriers."⁴⁷

Why then would an open cable Internet access policy somehow be painted as "regulation of the Internet"?

The Commission need wait no longer to adopt a cable open access policy fully in step with the competitive advanced services agenda the FCC has otherwise held firm.

⁴³ *Id.*

⁴⁴ *Letter from William Kennard to the Local and State Gov't Advisory Committee, at 2 (Aug. 10, 1999).*

⁴⁵ *See, e.g., Pleading Cycle Established For Comments on Conditions Proposed by SBC Communications Inc. and Ameritech Corporation For Their Pending Applications to Transfer Control, DA 99-1305, CC Docket No. 98-141 (rel. July 1, 1999) (proposing Internet-related conditions on the proposed merger); Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc., 13 FCC Rcd 18025, 18103, 18109-112 (1998) (requiring MCI to divest its Internet holdings).*

⁴⁶ *Citing Pro-Competitive Benefits to Consumers, Commission Approves AT&T-TCI Merger, Report No. CS 99-2, 1999 WL 74135 (Feb. 17, 1999).*

⁴⁷ *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc., 13 FCC Rcd 18025, 18103-104 (1998).*

Conclusion

With this deal's consolidation of cable's control over consumer choice among traditional and advanced video and integrated video/voice/data services, the place and time to act is here and now. The Commission should proceed while the architecture for cable broadband is still under construction. To wait any longer would allow the fundamentally anti-consumer approach of the cable industry to take root in the Internet and spread its closed broadband facility model nationwide. Must consumers await an "MFJ for the 21st Century"?

Obliging AT&T to afford unaffiliated ISPs access on nondiscriminatory terms and conditions—so that they, in turn, may offer consumers a choice in broadband Internet access—would be a narrow, easy to administer, and effective remedy. It would safeguard, rather than regulate, the Internet and the new communications marketplace. The openness it would afford is critical to a world in which—as boundaries are erased between communication services and applications—we ensure that consumers likewise are truly afforded choice without bounds.

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ATTACHMENT D

**COMMENTS ON ON AT&T'S DECEMBER 21, 1999 REQUEST FOR
WAIVER OF THE CABLE HORIZONTAL OWNERSHIP RULES**

COMMENTS ON AT&T'S REQUEST FOR WAIVER OF HORIZONTAL OWNERSHIP LIMITS

AT&T has submitted an untimely and procedurally defective request for an 18- month waiver of the FCC's cable television horizontal ownership rules. It should be dismissed.

I. BACKGROUND

On December 21, 1999, three days before the official Christmas holiday, AT&T filed 45 page *ex parte* reply comments. Conceding for the first time that its MediaOne acquisition might not be permissible under current FCC rules, AT&T buried - on page 30 - a request by AT&T for an 18-month temporary waiver of the cable horizontal ownership limits. This request came at the end of a supplementary round of pleading, following six months of formal pleadings and *ex parte* presentations on the merger. Interested parties had no prior opportunity to comment on any waiver before AT&T sprung its "Christmas surprise."

AT&T chose its moment to apply for a waiver with care. Many interested parties had already departed for the holidays, or were operating with skeletal staffing until after the New Year. Secreting the request in a reply submitted during a secondary pleading cycle further increased the likelihood that parties would not see the request for waiver until the deadline imposed by the Cable Service Bureau (CSB) for *ex parte* comments passed.

CU, *et al.* filed a motion for a new pleading cycle. The CSB denied this motion, although it extended the deadline for comments and presentations on the merger and provided an opportunity for a "sur-rebuttal" to AT&T's waiver request.

Accordingly, although CU *et al.* continue to maintain that a new pleading cycle to consider the waiver is required, CU *et al.* submit their comments on AT&T's waiver request as part of this testimony. As discussed below, AT&T has failed to meet the extremely high burden

of demonstrating that a waiver of the rules is warranted, and the Commission should therefore deny AT&T's request.

AT&T filed its initial application for transfer of control of MediaOne on July 7, 1999. Although the burden is on the applicant to establish that the transfer does not contravene Commission rules and policies, AT&T failed to address how the merged entity would comply with the Commission's rules establishing limits on cable TV horizontal ownership. Instead, AT&T discussed why the voluntary stay of the ownership limits pending resolution of a pending constitutional challenge to the underlying statute should prevent the FCC from applying the rules to AT&T, and why the Commission should abandon the rules generally. Public Interest App. at 60-67. In an apparent concession to the Commission's rules, AT&T did state that "if, under the rules the Commission adopts, AT&T exceeds the permitted level of horizontal ownership, it will either obtain an appropriate waiver based on the benefits to competition that will not otherwise be achieved, or bring itself into compliance with the rules." *Id.* at 61.

In response to this and other representations by AT&T, CU *et al.* and others repeatedly objected that AT&T had failed to provide adequate explanation of how it would comply with the rules. Nor did it seek a waiver of the ownership limits. *See, e.g.,* Motion to Dismiss of CU, *et al.*, filed August 17, 1999 at 4.

The Commission modified its cable ownership rules in October, 1999.¹ The CSB

¹On October 19, 1999, the Commission issued two orders relevant to this proceeding. In its *Third Report and Order* on cable horizontal ownership, *In re Implementation of Section 11© of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal Ownership, Third Report and Order* (rel. October 20, 1999) ("*Horizontal Ownership Order*"), the Commission modified the formula by which it computes the horizontal ownership cap, effectively raising the limit by about 20%. *Id.* at ¶37. The Commission, on its own motion, also modified its stay of enforcement the ownership limits. It concluded that it would lift the stay 180 days following a judgment affirming the

requested that AT&T demonstrate how the merged entity would comply with the amended horizontal ownership limits. On November 24, 1999, AT&T submitted a lengthy *ex parte* response in which it claimed that the merged entity would be in compliance with the new ownership and cable attribution rules. On December 15, 1999, CU *et al.* and others filed comments on AT&T's *ex parte*, demonstrating that the merged entity did not comply with the new rules.

AT&T filed reply comments on December 21, 1999. AT&T again insisted in its reply comments that the merged entity would comply with the new ownership rules without special conditions. *There, without warning, and for the first time, AT&T requested that the Commission grant a temporary waiver of the rules and give it an additional 18 months to comply with the ownership limits.*

On December 23, 1999, CU *et al.* and others filed a motion requesting a new pleading cycle to address AT&T requested waiver. As explained in that motion, AT&T's deliberate filing of its request immediately before the Christmas holiday, when many of the participants of the proceeding were on vacation, and burying the request in a larger filing of **secondary importance, ensured that many interested parties with a right to respond would not have a chance to see AT&T's request until January 3, 2000. Because the CSB adopted a pleading cycle that

constitutionality of the underlying statute, 47 USC §613(f). *Id.* at ¶73.

On the same day, the Commission released a *Report and Order* modifying the related cable attribution rules (*Cable Attribution Order*). In the *Cable Attribution Order*, the Commission modified the insulation criteria for limited partnerships, officers and directors. These change rendered certain otherwise attributable interests unattributable for purposes of the horizontal ownership rules, provided the parties met new insulation criteria. *Id.* at ¶¶63-68. CU *et al.* have filed Petitions for Reconsideration in both proceedings. In addition, Consumers Union has filed an action before the United States Court of Appeals for the D.C. Circuit requesting that the court order the Commission to lift the stay on enforcement of the horizontal ownership rules. *Consumers Union v. FCC* (No. 99-1522).

limited submissions on this matter, parties would have had only a brief window to make oral *ex parte* presentations. *See Motion of Media Access Project, et al. for New Pleading Cycle* (filed December 23, 1999).

The Commission declined to establish a new pleading cycle, but invited parties to file, by January 27, 1999, "sur-rebuttals" to AT&T's reply comments that addressed the waiver issue. In addition, the staff extended the deadline for *ex parte* presentations generally.

II. ARGUMENT

AT&T has failed to provide any justification for its request for a waiver of 18 months *in addition to* the six months the Commission has already granted all cable operators to comply with the rules once the stay is lifted.² AT&T has not attempted to meet its exceedingly high burden of demonstrating that special circumstances exist that warrant a departure from the Commission's rules. Nor has AT&T explained what steps it will take to bring itself into compliance, or why it will take an additional 18 months over and above the six months the Commission deemed sufficient when it extended the stay of enforcement.

Without a detailed road map explaining how AT&T will comply, and without a justification as to why it should take 18 months, the Commission cannot possibly determine whether a grant of a waiver serves the public interest. Nor, in the absence of an explicit timetable for divestiture, can the Commission hold AT&T accountable or monitor whether it will comply by

²CU *et al.* restate their request for a new pleading cycle to consider AT&T's waiver request, as required by statute and Commission rule in any case where an applicant substantially amends an application. *See* 47 USC §309(b), 47 CFR §78.20(c). Furthermore, as discussed above, the parties to this proceeding deserve a complete opportunity to thoroughly review AT&T's waiver request and file appropriate comments. The Commission's decision to allow an additional hasty round of briefing cannot substitute for the required new pleading cycle.

the end of the waiver period.

Instead, AT&T has attempted to blackmail the Commission by implying that it will abandon the merger if its demand for a waiver are not met. As AT&T stated in its waiver request: "denial of AT&T's limited waiver request could imperil the AT&T/MediaOne merger and thereby potentially deprive millions of American consumers of ... significant benefits." *Ex Parte Reply Comments*, (filed December 21, 1999) at p.36.

Even if AT&T's promised public interest benefits were credible, they do not outweigh the harm to the public in permitting AT&T to violate the ownership limits. Furthermore, as *CU et al.* have noted previously in these proceedings and as the Commission itself has found on several occasions, AT&T is already committed -- both financially and as a result of promises made when it acquired TCI -- to providing facilities-based local telephony and broadband Internet access on its own systems. There is no basis to conclude that holding more cable systems than the law allows will facilitate this deployment.

Finally, *CU et al.* note that only six months ago, in modifying the closely related broadcast ownership and attribution rules, members of the Commission decried the consequences of regulation by waiver. This merger presents the Commission's first true test as to whether it intends to operate under a rule of law, or a chaos by waiver.

A. AT&T Has Failed To Meet Its Burden To Demonstrate A Compelling Need For A Waiver

Under well-established case law and Commission precedent, AT&T has the burden of demonstrating that "special circumstances warrant a deviation from the general rule." *Northeast Cellular Telephone Co., LP v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). AT&T must make a

compelling showing to overcome the "high hurdle" that the general rule applies. *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). AT&T has utterly failed to make such a showing.

AT&T ludicrously claims that the Commission's decision to revise the cable horizontal ownership rules constitutes changed or special circumstances justifying a waiver. However, from the very moment the Commission stayed enforcement of the cable ownership rules, it has repeatedly warned cable operators at or near the cap that they acquire new systems at their own peril. *Horizontal and Vertical Ownership Limits*, 8 FCCRcd 8565, 8567 (1993). The Commission forcefully reiterated this warning in its 1998 *Second Report and Order*, admonishing cable operators that:

Affected parties will be required to come into compliance with the horizontal ownership rules within 60 days of the appellate court's issue of a mandate upholding Section 613(f)(1)(a) and the rules, unless the Commission determines as part of this ongoing proceeding to lift the stay at an earlier date. Interested parties ***including in particular parties that are now entering into business arrangements that would violate the rules but for the existence of the stay, should be well aware of the existence of the rules and thus have a full opportunity to be prepared to comply with them.***

13 FCCRcd 14462, 14492 (1998).

AT&T therefore had abundant notice that it proceeded with its planned merger with MediaOne subject to whatever rules the Commission adopted, and that it would be required to comply with whatever rules were in place once the stay was lifted.

Furthermore, AT&T's claim that it "believed in good faith that its post-merger limited partnership interest in TWE would qualify for insulation" and that "it cannot be disputed that the only basis for a contrary claim . . . came to light after the merger was announced," is absurd on its face. As the Commission itself observed, the only changes the Commission made to the pre-

attribution criteria acted to *relax* the insulation criteria to make mergers such as the AT&T/MediaOne deal *easier*. *Attribution Order* at ¶¶63-64, 68. If AT&T claims it is "surprised" by the "changed circumstances" presented by the Commission's October 1999 *Attribution Order*, the Commission should simply apply to AT&T the insulation criteria in effect at the time AT&T filed its merger application.

The only "surprise" to AT&T is that, despite its posturing for the benefit of Wall Street investment analysts, the FCC's rules really do apply to AT&T as much as to everyone else. Furthermore, the Commission has accommodated AT&T/MediaOne regarding by extending the stay of the rules from 60 days following a judgement affirming the constitutionality of the statute to 180 days following such a judgment. This exceeds by four months the time AT&T believed it had to come into compliance when it filed its application in July 1999. The Commission did this on its own motion after finding "that 60 days is an unduly burdensome time frame for interested parties to dispose of property necessary to come into compliance with the rule." *Horizontal Ownership Order* at ¶73. Therefore Commission has *already* made a public interest determination as to the length of time it should defer enforcement as a result of the pending judicial challenges. AT&T offers no cogent argument as to why it requires an additional 18 months over and above the six months the Commission has already granted it and all other cable operators to comply with the rules once the statute is upheld.

By any rational analysis, AT&T cannot claim it is "surprised" by the change in the rules, or that the equities demand the Commission provide AT&T with an *additional* 18 months over and above the *additional* four months the Commission provided in its October 1999 Order.

Indeed, if the Commission accepts this argument from AT&T, it will undercut the

Commission's authority to alter and enforce its own rules. Under the standard advanced by AT&T, any party can claim to be "surprised" by an agency rulemaking -- despite being put on notice throughout the course of the rulemaking and despite the rulemaking explicitly working to accommodate that party's interests. For the sake of its own authority, the Commission should reject AT&T's waiver request.

B. AT&T's Other Stated Grounds Do Not Justify A Waiver

AT&T s argues against application of the horizontal ownership rules to its attributable interest in TWE by insisting that the nature of its relationship with TWE is somehow different from other attributable interests and promising to set specific safeguards in place. The same reasons given by CU *et al.* elsewhere for rejecting these arguments apply equally in the context of waiver as in the general context of merger.

First, as CU *et al.* noted in its December 15, 1999 filing, AT&T's argument that its relationship with TWE is somehow outside the intended scope of the horizontal ownership rules is false. *See generally Comments of CU et al. on Ex Parte Comments of AT&T Corp. and MediaOne Group, Inc.*, (filed December 15, 1999). To the contrary, the horizontal ownership rules are designed to capture precisely these sorts of complex inter-relationships which provide AT&T with monopsony power over the cable and video programming markets, despite the paper separations between the parties purporting to give them independence.

Congress in fact directed the Commission to "take particular account the market structure, ownership patterns, and other relationships of the cable television industry" when formulating the ownership limits. 47 USC §533(f)(2)(C). In the *Cable Attribution Order*, the Commission

explicitly considered AT&T's³ relationships with programming distributors and other cable operators and concluded that the evidence required treating these interests as attributable. *Cable Attribution Order* at ¶37.

For the same reason, the Commission should reject AT&T's claim that it can fashion appropriate safeguards. The Commission considered to what degree it could safely permit cable operators such as AT&T to own other entities without attribution in its October 1999 *Attribution Order*. AT&T has not shown how its proposed safeguards address the concerns given by the Commission in that *Order*.

Indeed, the very *premise* of the attribution rules is that certain relationships allow an entity to exert influence or control in ways that cannot be monitored or safely contained. The insulation criteria represent the outer limit of what the Commission has concluded is safe to allow when balanced against the benefits to the public interest in permitting the relationship.

AT&T's offer to have additional certifications and to appoint new "independent" directors to Liberty does not even begin to address these concerns. Liberty's board of directors cannot avoid becoming aware that AT&T owns it, and has particular interests, and that it will be aware that they serve at AT&T's sufferance. This knowledge cannot help but influence their decision-making in a fashion that cannot be monitored by any number of certifications.

Furthermore, the certifications and safeguards offered by AT&T would prove insufficient to prevent active interference by AT&T or Dr. John Malone. It is simply not possible for an audit, even an "independent one" such as that proposed by AT&T, in its brief waiver request, to identify the thousands of ways in which AT&T and Dr. John Malone can influence and control

³The Commission's Order refers to TCI, now part of AT&T.

Liberty's decision-making processes. The Commission has recognized since it first fashioned the insulation criteria in 1984, that limited partners, officers and directors may influence or control an entity in ways that are impossible to detect, even where repeated and invasive government reporting is required. *1984 Order* 97 FCC2d 997, 1010 & 1025 (1984).

C. The Commission Explicitly Rejected AT&T's Arguments In Its Recent Rulemaking Decisions.

AT&T raises several arguments that the Commission explicitly rejected in its recent rulemakings. In the October 1999 *Horizontal Ownership Order*, the Commission explicitly rejected MediaOne's request to exempt arrangements already in existence or contemplated prior to the issuance of the further notice of proposed rulemaking in 1998. As the Commission observed, "[p]arties have been on notice since the *Second Report and Order* was released in 1993 of the horizontal limit." *Horizontal Ownership Order* at ¶65.

In the same order, the Commission rejected AT&T's argument that a waiver of the 30% limit is necessary to encourage deployment of broadband or local telephony services. As the Commission found:

A 30% limit allows a cable operator to gain access to a substantial portion of the market to provide Internet access and telephony. ***The cable operators have presented no credible evidence that a larger size is necessary for the deployment of advanced technologies or telephony.*** Moreover, we note the possibility of cooperative arrangements among the operators to offer coordinated telephony services through their cable systems, so that a cable operator does not necessarily need to grow in absolute size beyond the limit in order to participate in the offering of a national telephony service.

Id. at ¶61.

Furthermore, contrary to the assertions of AT&T, the Commission found credible evidence that AT&T has already used both its existing size and its existing relationships with

other cable operators and cable programmers to engage in precisely the kind of anticompetitive behavior the horizontal ownership limits were designed to protect against. *Horizontal Ownership Order* at ¶59; *Cable Attribution Order* at ¶37. The Commission therefore cannot reasonably find credible AT&T's claim that allowing it to expand further and acquire new ownership interests in other cable operators and programmers poses no danger. Accordingly, the Commission should deny AT&T's request for a waiver of these rules.

Prior to the release of the October 1999 orders, representatives of AT&T and MediaOne met extensively with Commissioners and staff to present their views on the pending rulemaking and how it would impact the merger. *See, e.g., Notices of Ex Parte Communications* filed September 10, 1999 (describing numerous meetings between AT&T staff, Commissioners, and CSB staff to discuss "the need to conform the cable ownership and attribution rules to the programming concerns underlying the...statute," and "the impact of the cable horizontal ownership and attribution rules upon the proposed merger of AT&T and MediaOne").

The Commission's formulation of the final rules as enunciated in the October 1999 orders therefore already takes into account the arguments raised by AT&T here. Indeed, in response to the concerns raised by AT&T, the Commission modified the attribution criteria and elements of the horizontal ownership rules. The Commission has already performed, therefore, the balancing of the potential benefits cited by AT&T against the harms of concentration articulated by Congress when it required the Commission to establish ownership limits. AT&T has shown nothing that justifies altering the Commission's considerations when it issued its final rule four months ago.

D. The Commission Should Ignore AT&T's Attempt to Blackmail the

Commission Through Its Threat To Cancel The Merger.

AT&T attempts a peculiar form of blackmail. Recognizing the Commission's appropriate concern to see broadband services and facilities-based local telephony deployed, AT&T threatens to withdraw from the merger and thus (supposedly) sabotage the deployment of these services.

AT&T warns that "A Commission determination that TWE is attributed to AT&T and a denial of AT&T's limited waiver request could imperil the AT&T/MediaOne merger and thereby potentially deprive millions of American consumers of these significant benefits." *Ex Parte Reply Comments* at 36.

The Commission should call AT&T's bluff. As an initial matter, as CU *et al.* have explained in previous filings that the merger is not necessary to force AT&T to deploy broadband and local telephony, given its investment in TCI. Second, as the Commission itself has found, AT&T need not acquire MediaOne in order to provide broadband and telephony. "Moreover, we note the possibility of cooperative arrangements among operators to offer coordinated telephony services through their cable systems, so that a cable operator does not necessarily need to grow in absolute size beyond the limit in order to participate in the offering of a national telephony service." *Horizontal Ownership Order* at ¶61.

In addition, AT&T has not demonstrated why it requires MediaOne's systems to offer telephony and associated services on the cable systems it already owns. AT&T promised such deployment when it acquired TCI, and the Commission approved the license transfer on the basis of AT&T's representations. *Application for Transfer of Licenses From Tele-Communications, Inc. to AT&T Corp.*, 14 FCCRcd 3160, 3230-31 (1999). Thus, AT&T's failure to acquire MediaOne should not affect AT&T's deployment on the systems it already owns..

Nor will the failure of the merger interfere with deployment of telephony and associated services on MediaOne's systems. MediaOne was already deploying telephony and broadband Internet services prior to the announcement of the merger. Even if MediaOne needs a merger partner to deploy successfully, AT&T is not the only potential partner for MediaOne. Indeed, AT&T won MediaOne in a bidding war with Comcast. If AT&T cannot meet the requirements of the Commission's rules and must therefore abandon the merger, MediaOne will not lack for suitors eager to take AT&T's place.

Last August, the Commission recognized the error of encouraging, in the words of Chairman Kennard "administration by waiver, not by rule." *1999 Broadcast Attribution Order*, 14 FCCRcd at 12658. As part of its revision the Commission determined it would consider LMAs for more than 15% of a station's time an attributable interest. *Id.* at 12597. In separate statements, the majority of the Commissioners expressed their regret that the Commission had granted extensive waiver relief. As Commissioner Ness stated:

I have long felt that our rules were susceptible to "gaming." We have been too willing to permit through the back door what we would not countenance through the front ... As a consequence, we have penalized those who most diligently followed the letter and spirit of our rules, and rewarded those who "pushed the envelope" most aggressively.

Id. at 12661.

Only six months later, AT&T asks the Commission to permit precisely the sort of "gaming" decried by Commissioner Ness and Chairman Kennard. If the Commission does not wish to see a return to "administration by waiver, not by rule," it must deny AT&T's waiver request.